

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CU 1942

DANA GOLEMI AND ROBERT GOLEMI

VERSUS

JO TYLER AND RUSSELL ROBERTS

Judgment Rendered: February 8, 2008

**Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 2006-15855**

The Honorable Donald M. Fendlason, Judge Presiding

**Ronald S. Hagan
Frank P. Tranchina, Jr.
Covington, Louisiana**

**Counsel for Plaintiffs/Appellees
Dana Golemi and Robert Golemi**

**Sharry I. Sandler
Metairie, Louisiana**

**Counsel for Defendant/Appellant
Jo Tyler**

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

GAIDRY, J.

A minor child's maternal grandmother appeals a judgment awarding the child's sole legal custody to his maternal aunt and her husband. For the following reasons, we pretermitt consideration of the merits and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

The minor child, H. R., was born on November 2, 1997.¹ In 2002, the child's maternal grandmother, Jo Tyler, was granted his custody in a juvenile court proceeding in Plaquemines Parish. His mother died on September 29, 2006. Dana Golemi (Ms. Tyler's daughter and H.R.'s aunt) and her husband, Robert Golemi, instituted the present action in the 22nd Judicial District Court for the Parish of St. Tammany on November 27, 2006, seeking H.R.'s custody. Named as defendants were Ms. Tyler and H.R.'s biological father.² In their petition, the plaintiffs requested the appointment of a mental health professional to conduct a custody evaluation. The trial court thereupon appointed Alicia Pellegrin, Ph.D., to conduct the requested evaluation and to render an opinion to the court, with copies to be provided to the parties.

Dr. Pellegrin submitted her report, and the trial court ordered the parties to appear at an intake conference before the court's hearing officer and social worker on May 23, 2007. The custody hearing before the court was set for June 18, 2007. Following the intake conference, the hearing officer and social worker made certain recommendations based upon Dr.

¹ We refer to the minor child by his initials out of an abundance of caution, as it has been asserted that he has been previously adjudicated as a child in need of care. *See* Rule 5-1, Uniform Rules of Louisiana Courts of Appeal.

² Although domiciliary service of process was made on the biological father, he never made an appearance or participated in the proceedings. The parties concede that he died on July 25, 2007, two weeks after the trial court's judgment was signed.

Pellegrin's evaluation, including that H.R. remain in Ms. Tyler's physical custody and that Ms. Golemi be allowed visitation for up to two weekends per month during the school year. The parties also entered into certain stipulations regarding other periods of visitation by Ms. Golemi. Disputes regarding the terms of the recommendations and stipulations subsequently developed between the parties.

On June 18, 2007, the trial court held the custody hearing. Ms. Tyler was unrepresented by counsel through that point of the proceedings. Following the presentation of testimony and introduction of evidence, the trial court delivered its oral reasons for judgment, ruling that it was in H.R.'s best interest that the plaintiffs be granted his custody. The trial court's judgment was signed on July 9, 2007. Ms. Tyler appeals.

ANALYSIS

In her trial testimony and on appeal, Ms. Tyler contends that she had been led to believe by the plaintiffs and their attorney that the purpose of the custody hearing was simply to formally render judgment in accordance with the prior recommendations and stipulations. She claims that she therefore did not retain counsel and was unprepared to present supporting testimony and evidence at the hearing. Ms. Tyler has moved to supplement the record with two "new" exhibits, not introduced into evidence or otherwise in the record: Dr. Pellegrin's report detailing her evaluation, and the judgment of the 25th Judicial District Court for the Parish of Plaquemines, dated May 9, 2002. We must deny the motion. The court of appeal is not a court of original jurisdiction, and cannot receive new evidence or exhibits. *Guilbeau v. Custom Homes by Jim Fussell, Inc.*, 06-0050, p. 5 (La. App. 1st Cir. 11/3/06), 950 So.2d 732, 735.

In addition to challenging the merits of the trial court's judgment, Ms. Tyler challenges the subject matter jurisdiction of the trial court, contending that the juvenile court in Plaquemines Parish retains continuing, exclusive jurisdiction relating to H.R.'s custody. The plaintiffs dispute that contention, urging that the trial court has exclusive or at least concurrent subject matter jurisdiction. The issue of subject matter jurisdiction addresses the court's authority to adjudicate the cause before it; the issue may be considered at any time, even by the court on its own motion, at any stage of an action. *State v. Wade*, 03-1364, p. 3 (La. App. 1st Cir. 12/3/03), 868 So.2d 110, 112. Additionally, we have consistently held that we have the duty to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. *City of Baton Rouge v. Bernard*, 01-2468, p. 4 (La. App. 1st Cir. 1/22/03), 840 So.2d 4, 6, *writ denied*, 03-1005 (La. 6/27/03), 847 So.2d 1278.

Louisiana Children's Code article 309 provides, in pertinent part:

A. Except as provided in Article 313, *a court exercising juvenile jurisdiction shall have continuing jurisdiction over the following proceedings and the exclusive authority to modify any custody determination rendered*, including the consideration of visitation rights:

(1) Child in need of care proceedings pursuant to Title VI.

. . .

B. In exercise of its jurisdiction to determine the custody of a child under writs of habeas corpus or when custody is incidental to the determination of pending cases, a district court may enter an order of custody or modify any prior order of custody rendered by a juvenile court concerning the same child in any proceeding except those enumerated in Paragraph A of this Article. (Emphasis supplied.)

As stated above, the exceptions to a juvenile court's exclusive continuing jurisdiction are set forth in La. Ch.C. art. 313:

A court exercising juvenile jurisdiction no longer exercises such jurisdiction in any proceeding authorized by this Code upon:

- (1) Declination of jurisdiction.
- (2) Transfer of the proceeding.
- (3) Expiration or satisfaction of an informal adjustment agreement.
- (4) Expiration or satisfaction of an informal family services plan agreement.
- (5) Expiration, satisfaction, or vacation of a juvenile disposition or adult sentence.
- (6) Dismissal of the proceeding.

The plaintiffs cite *State in Interest of Brown*, 615 So.2d 1072, 1073 (La. App. 4th Cir. 1993), interpreting La. Ch. C. art. 313, for the proposition that “juvenile court jurisdiction ends when there is an adjudication that . . . a child is in need of care[.]” We must disagree with that broad statement in the present context. As the cited case actually involved a child charged with juvenile delinquency, rather than a child in need of care, the quoted statement is technically *dictum*. Additionally, the trial court’s judgment in that case apparently was rendered prior to the effective date of Acts 1992, No. 705, § 1, deleting former subparagraph (7), which had included “permanent placement of the child” as a basis for termination of juvenile court jurisdiction.³ Under the present version of La. Ch.C. art. 313, “*the court retains jurisdiction, even though a permanent placement has been achieved for the child, for any disputes arising thereafter in connection with the placement.*” La. Ch.C. art. 313, Comment – 1992.

If the Plaquemines Parish judgment involved a permanent placement with Ms. Tyler as legal guardian, and the proceeding in that court as a

³ “Permanent placement” is defined as including the placement of the child with a legal guardian. La. Ch.C. art. 603(15).

juvenile court was never transferred or dismissed, that court would retain continuing jurisdiction to determine the present custody dispute, to the exclusion of the court below. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. La. C.C.P. art. 3. As our appellate jurisdiction is necessarily derivative of that of the trial court, we might also lack jurisdiction to consider the merits of the judgment at issue. There is no competent evidence in the record relating to the nature and status of the Plaquemines Parish proceeding. Under these circumstances, we must remand this matter to the trial court for the limited purpose of conducting an expedited evidentiary hearing on the factual issues of the nature and status of the Plaquemines Parish proceeding and that court's jurisdiction relating to H.R.'s custody. *See Medus v. Medus*, 379 So.2d 21, 23-4 (La. App. 3rd Cir.), *writ denied*, 381 So.2d 1235 (La. 1980). We will accordingly defer our review of the merits of the appeal pending the trial court's disposition of the evidentiary hearing and the appropriate supplementation of the record.

Because Dr. Pellegrin's report was specifically issued for the trial court's benefit, referenced in the trial testimony and exhibits, and expressly relied upon by the trial court's hearing officer and social worker in their recommendations, it clearly constitutes relevant and important evidence. Although the transcript and oral reasons for judgment are equivocal on the issue of whether the trial court considered the contents of the report, we conclude that it probably did so. In the interests of justice, therefore, we direct the trial court on remand to supplement the record with Dr. Pellegrin's report. *See* La. C.C.P. arts. 2132 and 2164. Although all parties concede that the child's biological father is now deceased, for the sake of

completeness of the record we will also order that the trial court record be supplemented with the father's death certificate.

DECREE

This matter is remanded to the trial court for the purpose of conducting an evidentiary hearing within thirty (30) days of the issuance of this opinion, limited to the factual issues of the nature and status of any relevant proceeding in the 25th Judicial District Court for the Parish of Plaquemines, or any other court exercising juvenile jurisdiction, and that court's jurisdiction relating to H.R.'s custody. The record of the trial court shall also be supplemented with the exhibits and minute entry of the evidentiary hearing, the report of Alicia Pellegrin, Ph.D., and the death certificate of H.R.'s father. In the event that the trial court determines that it has subject matter jurisdiction, the record, as supplemented, and the trial court's minute entry for the evidentiary hearing shall be promptly submitted to this court in order that this appeal may proceed to final disposition, with assessment of costs of appeal pretermitted pending such final disposition. In the event that the trial court determines that it does not have subject matter jurisdiction, its judgment signed July 9, 2007 shall be vacated and it shall transfer this action to the court having such jurisdiction, with all costs of this appeal assessed to the plaintiffs, Dana Golemi and Robert Golemi.

MOTION TO SUPPLEMENT RECORD DENIED; REMANDED WITH ORDER.